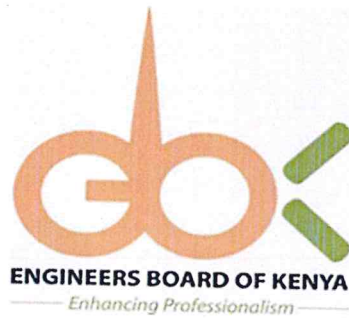




REGULATORY IMPACT STATEMENT

ON

THE ENGINEERS (SCALE OF FEES FOR PROFESSIONAL ENGINEERING SERVICES) RULES, 2021

This Regulatory Impact Statement (RIS) has been prepared by the Engineers Board of Kenya pursuant to Section 6 and 7 of the Statutory Instruments Act (No. 23 of 2013)

SEPTEMBER, 2021

1. THE ENGINEERS (SCALE OF FEES FOR PROFESSIONAL ENGINEERING SERVICES) RULES, 2021

The Engineers Rules 2021 constitute regulations to the Engineers Act, 2011 developed within the provisions of Section 58 and Section 7 (1) (s) of the Engineers Act, 2011.

1. INTRODUCTION

The Engineering profession has been regulated since 1969 under the Engineers Registration Act (1969) now repealed, and currently, the Engineers Act 2011, referred to, herein, as the “Act”.

The Act provides for the establishment of the Engineers Board of Kenya, referred to herein as the “Board” with the mandate of registration of engineers and firms, regulation of engineering professional services, setting of standards, development, and general practice of engineering.

Section 58 of the Act Mandates the Board with the approval of the Cabinet Secretary to make rules generally for the better carrying into effect the provisions of the Act. Further, Section 7 (1) (s) mandates the Board to, determine the fees to be charged by professional engineers and firms for professional engineering services rendered from time to time.

To ensure the operationalization of Section 7 (1) (s) and 58 of the Act, the Board established the Taskforce Committee to Develop the Engineers (Scale of Fees for Professional Engineering Services) Rules, 2021. The Committee through extensive deliberations generated the draft Rules which were subjected to adequate public participation.

The Regulatory Impact Statement provides the basis of the development of the Rules and assesses the costs and benefits of the implementation of the Rules.

1.1 BACKGROUND

The Board developed the draft regulations and subjected them to stakeholders engagement who gave their views and input regarding the Rules. All the stakeholders’ views and comments were considered and adequately incorporated to the draft Rules. The Board, through several consultations and under the guidance of the State Law Office has finalized the Engineers (Scale of Fees for Professional Engineering Services) 2021.

Upon receipt of the final copies from the Office of the Attorney General and approval of Cabinet Secretary in charge of the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works, the Board will publish the Engineers Rules 2021 pursuant to Section 58 of the Engineers Act, 2011.

1.2 THE ENGINEERS (SCALE OF FEES FOR PROFESSIONAL ENGINEERING SERVICES) RULES, 2021

The Engineers Act, 2011 established the Engineers Board of Kenya and provides the legal framework for the provision of professional engineering services including, among other functions, determining the fees to be charged by professional engineers and firms for professional engineering services rendered from time to time.

Section 58 (d) of the Act provides that the Board, with the approval of the Cabinet Secretary, may;

- Prescribe the standards and conditions of professional practise for persons registered or licensed under the Act which shall not be limited to conditions of engagement for engineering services in projects where engineers work with other professional, scale of fees applicable to such engagements, hourly rates applicable for report and advisory work and any other guidelines for ethical professional practise of engineering.

The Board has therefore developed rules that prescribe various requirements that need to be implemented under the Act, including the following;

- Description of professional engineering services offered and the fees payable for the services rendered.

1.3 PURPOSE AND OBJECTIVES OF RULES

The main purpose of the proposed Engineers (Scale of Fees for Professional Engineering Services) Rules, 2021 is to provide a framework for the engineers to provide technically feasible, economically viable and sustainable engineering solutions in an ethical and professionally accountable manner while in return receive reasonable compensation for the professional engineering services. There was a scale of fees developed in 1987 by the then Ministry of Public Works but considering the time and the tremendous growth and

development of the engineering practise, both regionally and globally, the change in engineering trends and disciplines, the 1987 scale of fees is not aligned to the current practice and, therefore, not applicable. This means there is not legal framework by which engineers can adequately be engaged by the public to offer professional engineering services, while in return be reasonably remunerated.

The objectives of the Rules are geared to having a safe, efficient, and effective infrastructure, system and processes for Kenya as they:

- i. Prescribe the framework for determining the minimum fees chargeable by professional engineers for professional engineering services;
- ii. Outline and describe the professional engineering services offered by engineers to the public.
- iii. Prevent undercutting by and among professional engineers who offer professional engineering services and;
- iv. Ensure the provision of quality professional engineering services thereby guaranteeing the safety and welfare of the public and enhancement of socio-economic development of the Country.
- v. Address the challenge of collapsing of buildings and other infrastructure as the public will be required to engage professional engineers at every stage of project implementation.

2. CONSULTATIONS ON THE DRAFT INSTRUMENT

2.1 Public consultation is a constitutional requirement in making any statutory instrument. It avails all the interested or affected parties with an opportunity to present their views.

2.2 With regard to the subsidiary legislation making process, the Statutory Instruments Act requires that the regulatory making authority shall make consultations before making statutory instruments (Regulations), and in particular, where the proposed regulations are likely to have a direct or a substantial indirect effect on business or restrict competition.

2.3 In line with section 5 of the Statutory Instruments Act, the Taskforce that generated the draft Regulation identified and engaged key stakeholders and members of the public for their views and comments. These stakeholders included professional and specialist institutions

and the general public who were directly or indirectly likely to be affected by the proposed statutory instruments.

2.4 Some of the institutions and entities consulted include, the Institute of Engineers of Kenya, Association of Consulting Engineers of Kenya, Statutory Regulators, Academia, Private Sector, County Governments, various implementing Agencies, Hospitals, Professional Engineers and consumers of engineering services drawn from various sectors.

2.5 Taking into consideration the prevailing COVID-19 global pandemic, and the attendant health protocols, the following methodology was adopted for public consultations:

- a) A draft of the Rules was published on the Board's website;
- b) A call for comments was published on 14th July 2020 in a newspaper of national circulation inviting submissions and the same was circulated through social media platforms;
- c) Direct letters and emails were written to all the stakeholders inviting them to make their submissions on the draft Rules within the outlined period;
- d) Extensive virtual/online meetings were held with select stakeholders and members of the public.
- e) All the stakeholder views and comments were considered and incorporated where applicable.

2.6 In this regard therefore, it is evident that the proposed Rules have been subjected to an extensive public participation program and thus attained the public participation threshold as required by the Statutory Instrument Act. Annexed to this Statement is a detail public participation report including an analysis of the comments received.

3. IMPACT STATEMENT

3.1 The impact assessment considers the likely impact of the draft rules including the general positive or negative externalities, impact on the fundamental rights of the people, the impact on the economy, the public sector and environmental considerations. The summary of the key findings is as follows:

3.2. Impact on Fundamental Rights and Freedoms and Environment

- a) The draft Rules is not expected to have a negative impact on fundamental rights of persons or institutions that are subject to it. The Rules seeks to ensure actualization of the Bill of Rights, particularly on the right to consumer protection under Article 46 of the Constitution.
- b) The proposed Rules is not expected to have any possible negative impact on the environment or environmental rights of the people.

3.3 Economic Impact

The Rules will ultimately lead to a better regulated and more competent and competitive engineering profession and practice leading to a rise in the quality of standards. The public and the Country at large will be guaranteed value for money of the projects. The Rules will ensure that engineers are engaged to offer professional engineering services at a reasonable remuneration. This will result in safe, resilient and sustainable infrastructure, leading to preservation of lives and investment, leading to the realization of the National Developmental Agenda, such as the Vision 2030.

3.4 Social Impact

The current situation, whereby there is no framework for remuneration, has resulted to the public engaging persons NOT licensed by the Board to offer engineering services. This has led to projects being implemented with minimal or lack of professional engineering input/service, resulting in poor workmanship, inadequate supervision etc. This is evident in what is turning out to be a huge problem in the Country, collapsing of infrastructure, particularly buildings. This has resulted in the needless loss of lives and investment. Most of the families have lost their breadwinners. This causes social strife on the families affected, their dependents and generally the entire nation loses. As mentioned earlier, the cause of this is the lack of a framework for engaging engineers, which has resulted in owners/developers engaging personnel not licensed to offer engineering services, resulting in poor workmanship as the projects are not implemented with the required standards and quality.

3.5 Impact on the Public Sector

The Rules provide for a detailed description of engineering services. A consumer of professional engineering services will therefore be properly informed of the full scope and

extent of the engagement of the professional engineer's services. This will therefore assure accountability on both the professional engineer and the client.

The Rules have elaborated on the phases of provision of engineering services and the specific outputs of each of the phase. This will aid the client in terms of project planning and the engagement of specific professional services at the attendant phases.

The Rules provide for a basis of determination of professional engineering services between the Client and the professional engineer without the need of intermediaries. This will assure better client-professional relationship throughout all the stages of the project and assure value for money for services rendered.

The public stands to gain by use of professional engineering services as espoused in the Rules as there is value for money. In addition, through the Rules, the safety and welfare of public is guaranteed.

In the recent past, there have been collapse of infrastructure, mainly buildings, where the engineers were not involved in the implementation of the projects, to offer professional engineering services, as there is no existing framework for remuneration of the engineers. Below is a table showing the comparative analysis of the cost use of professional engineering services vis-a-vis not using and the effect on the socio-economic development of the nation.

COST/BENEFIT ANALYSIS OF ENGAGING THE SERVICES OF A PROFESSIONAL ENGINEER VS NOT ENGAGING, WITH THE RISK OF COLLAPSING OF INFRASTRUCTURE AS RECENTLY WITNESSED IN THE COUNTRY.

	Projects	Potential Cost of professional engineering services as provided for in the Rules	Potential Cost of NOT using professional engineering services leading to collapse of infrastructure	Comments
1	Collapse of approximately ten (10) residential buildings spread throughout the country from 2018-to-Date.	Approximately Kshs. 45,000,000	• More than 12 fatalities • Loss of approximately Kshs. 800,000,000 worth of investment. • Possible lawsuits	Though most cases are still under investigations, it is evident that, in majority of the said projects, professional engineers were NOT Engaged in this implementation of the project(s). This has resulted in a huge loss of lives and investment.

One life needlessly lost is too costly; the persons who have lost their lives were breadwinners, with dependents. They were skilled personnel who could have gone on to continue in the development of the nation, therefore there is loss in manpower, ideas, and skills. The loss of investment is close to **approximately Kshs. Eight Hundred Million** in just the few projects. This is in addition to possible lawsuits and possible jail terms and heavy penalties because of non-compliance and cutting short-cuts on the part of the developers/owners. This is compared to a sum of **approximately Kshs. Forty Five Million** which would have been remunerated to the professional engineers, in addition to having lives preserved, investments secured, and development of the nation assured.

Therefore, the cost of not engaging professional engineers, as espoused in the Rules is too costly a route for the country to realize any substantial socio-economic development whatsoever.

4. OPTIONS AVAILABLE FOR ACHIEVING THE OBJECTIVES

The objectives of the Rules are in line with the Engineers Act, 2011 and are geared towards guaranteeing public safety and welfare by ensuring provision of quality professional engineering services at reasonable remuneration and institutionalizing the growth of engineering practice by preventing unethical practices such as undercutting.

4.1 Do nothing option

This option will not help achieve the desired objectives as the status quo will remain. This means the public will continue to engage persons NOT licensed by the Board and therefore not qualified to offer professional engineering services. This leads to poor project design and implementation resulting in compromising the safety and welfare of the public which is manifested in the collapsing of infrastructure such as buildings, bridges, and sections of roads.

Furthermore, another issue in the do-nothing option is maintaining the status-quo of the current problem of price undercutting in engineering practice. Common to the procurement of other professional services, a low fee is not necessarily a reflection of good value or in the best interest of the client. Adequate professional fees are required by the professional

engineer to deliver technically and satisfactory professional engineering services to clients with particular emphasis on the safety and welfare of the public.

This current unethical practise of procuring professional engineering services by competitive bidding based on a financial discount and price undercutting is counter-productive to good engineering practise, life cycle costs, the growth of local capacity and is contrary to all accepted best practice methods of competitive tendering for professional services. This is because discounts and/or price undercutting are typically determined without any consideration of actual design consideration and costs, resulting in declining of standards and quality of service, which is the cornerstone of the profession and the development of the nation. Furthermore, price undercutting results in a negative impact on the entire industry and the infrastructural development of the Country as a whole as there is compromise on the quality of professional engineering services resulting in the public NOT getting value for money for the projects.

4.2 Explicit Government Regulation Option-Issuance of Guidelines

The Rules are based on explicit government regulation option by way of statute, the Engineers Act, 2011. Whereas the government may also adopt indirect regulation through the issuance of guidelines, which may achieve the same objectives, the Act requires the Board to make rules on the specific areas identified. Failure to effectively regulate provision of professional engineering services, because of lack of the legal framework of offering professional engineering services at reasonable remuneration poses a major public health and safety risks arising from non-adherence to the set standards and unethical practices.

5. COSTS BENEFITS MODELLING

5.1 Resource Allocation Costs

The enactment of these rules will NOT result in any additional resource allocation from the government.

5.2 Administrative Costs

The enforcement of these rules will not result in major administrative costs to the detriment of the Board. The rules will not necessitate revision of the Board's approved establishment

and organizational structure but will facilitate full implementation of the Board's mandate as the professional engineering practice will be enhanced which results in the assurance of public safety and welfare.

6. CONCLUSION AND RECOMMENDATION

The regulatory impact statement has analyzed two available options i.e. do-nothing option and explicit government regulation. The Board rejects the do-nothing option as it will not enable the achievement of the set objectives. In fact, with the do-nothing option, the safety and welfare of the public continues to being a real risk, especially in the collapsing of buildings and other infrastructure that is now prevalent.

The Board recommends explicit government regulation through the Engineers Rules 2021 as it provides the greatest net benefits across the stakeholders.

The Rules will enable the Board to effectively regulate the engineering practice to realize a safe, efficient and effective infrastructure, systems and processes for Kenya. This translates to the country overcoming the problem of collapsing of infrastructure, especially buildings. This also means that the lives and investments that would have been lost, will hence forth, be preserved. Furthermore, the public is rest assured of value for money in all the projects, at both National and County government level, which leads to the realization of the National Developmental Agenda, such as Vision 2030.

7. IMPLEMENTATION AND REVIEW

The Board will implement the Engineers Rules 2021 through gazettelement in the Kenya Gazette. Review shall be done when need arises by consulting all the stakeholders and gazettelement of the amendments.

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REGISTRAR/CHIEF EXECUTIVE OFFICER

ENGINEERS BOARD OF KENYA

Signature.....



Date.....

28.9.2021